INDEX

	Page
Circuit Court's Opinion	3
Summary Statement of the matter involved	3
Jurisdiction	5
Statutes Involved	6
Reasons relied upon for allowance of Writ	7
Brief of Petitioner	10
Opinion Below	11
Statement of Grounds on which the Jurisdiction of This Court is Invoked	11
Specifications of Error	11
Argument	13
Conclusion	20
Appendix	
Conciliation Commissioner Opinion and Findings as certified to District Court	22
Trial Courts Opinion	30
Circuit Court's Opinion	

TABLE OF CASES

Atwood, et. ux v Deming Inv. Co. 55 Fed. 2d 180 (1932)	3-20
Campbell v Green, 112 Fed. 2d 143 (1940)	15
City of New York v Saper Trustee 69 Sup. Ct. Rep. 554 (1949)	13
Cody v Lowry 91 S.W. Rep. 1109 (1906)	15

Page

Federal Land Bank v
Morrison 133 Fed. 2d 613 (1943). 18
Fridenheit v Edmunsen
36 Mo. 227, 88 Amr. Dec. 141 14
Ford v Washington Nat'l Bldg. & Loan
10 Idaho 30. 109 Amr. St. Rep.
192 (1904). 20
Green v Grant 96 N.W.Rep. (Mich)
583 (1903). 20
Hawthorne v Siegal 88 Calif. 159
22 Amr. St. Rep. 291 (1891) 14
Hepker v Equitable Life Assur. Soc.
131 Fed. 2d 926 (1942) 18
In Re. Oklahoma Ry. Co. 61 Fed.
Sup. 96 (1945). 13
In Re. Phoenix Hotel Co.
20 Fed. Sup. 240 17
In Re Elmore Cotton Mills
217 Fed. 810 (1914). 20
Johnson v Norris 1915-B LRANS
884 (1911). 13
Kivoichi Fujikawa, et. al. v Sunrise
Soda Water Works 158 Fed. 2d
490 (1946). 13
Kalb v Feuerstein 308 U.S. 433
60 Sup. Ct. Rep. 343 (1940). 4
Lurie, et. al. v Steckel
79 Fed. Sup. 723 (1948). 15
Miller v Life Insurance Co.
118 N. Carolina 612.54 Amr.
St. Rep. 741 (1896) 20
Ottawa Gas Light etc. Co. v
Graham 28 Ill. 73.81 Amr. Dec.263 14
Shropshire, et. ux v Commerce Farm
Credit Co. 30 S.W.Rep. 2d 282 20

Page

Union Guardian Trust Co.
v Crawford 258 N.W. Rep.
248 (Mich. 1935) 20
Van Der Velde v Wilson 142 N.W.
Rep. 553 (Mich. 1913) 20
Worley v. Wahlquist
150 Fed. 2d 1007 (1945) 17
Wragg v Fed. Land Bank
145 Fed. 2d 816 (1944) 17
Wright v Union Central Life Ins. Co.
311 U.S. 273.61 Sup. Ct. Rep. 17

STATUTES CITED

Section 75
Bankruptcy Act . . . 2-3-5-11-11-17-18-18-20
Wisconsin Statute 115.05 5-7-20
63 Corpus Juris 1013. 14
63 Corpus Juris 1035, 1036,
1037 and 1026. 14
Amendment of Mch. 11, 1944 to
Bankruptcy Act of Sec. 75 U.S.
Code Sup. IV Title 11 Sec. 203 USCA
regarding appointment of Conciliation
Commissioners. 18

SUPREME COURT OF THE UNITED STATES
October Term, 1949

No. _____
IN BANKRUPTCY

In the Matter of:

ERNEST NEWTON KALB
Debtor
ERNEST NEWTON KALB
Petitioner

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN, Secured Creditors, and OSCAR JACOBSON, Trustee. Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Fred M. Vinson, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Ernest Newton Kalb, petitions this honorable court for a petition for a writ of certiorari to review the decision and judgment of the United States Circuit Court of Appeals for the Seventh Circuit rendered in the above entitled cause on October 21, 1949, which decision affirms the judgment of the United States District Court of the Eastern District of Wisconsin, which decrees,

in substance, that respondents are entitled to an accounting as in an ordinary action, entitled to a credit of all claimed in addition to the mortgage debt, with interest on all annually, and that all should be included in determining the amount necessary to be paid by petitioner in order to redeem his farm, thereby denying petitioner all the benefits of the bankruptcy act and especially Sec. 75-s thereof, whereby said act is judicially repealed as to this petitioner.

Also construes the Wisconsin statute providing for usury and decrees respondents' mortgage debt not usurious, contrary to the decision of the U.S. Circuit Court of the Fifth Circuit (Atwood et us. v. Deming Inv. Co. et al., 55 Fed. 2d, 180) wherein it is held that under the Texas statute containing the same definition of usury, such a mortgage is usurious.

CIRCUIT COURT'S OPINION

The Opinion of the Circuit Court of Appeals has not yet been reported in 177 Fed. Rep. 2d, 243 on Dec. 5, 1949 but it is printed herein in the Appendix, together with the opinion of the District Court of the Eastern District of Wisconsin, is printed herein in the Appendix.

SUMMARY STATEMENT OF MATTER INVOLVED

Litigation has continued for many years between the parties hereto, beginning with the respondent's foreclosure of a mortgage on petitioner's real estate, wherein the mortgage was foreclosed, the real estate sold, and a sheriff's deed

secured by respondents, who remained in possession for eight years. Following a decision of this court (Kalb v. Feuerstein, 308 U. S. 433, 60 Sup Ct. Rep. 343 (1940), and petitioner then petitioning for the benefits of said Sec. 75-s, he regained possession of the real estate, secured the 3-year stay, real estate appraised at $12,000.00 and, prior to the expiration of three years, deposited $5,300.00 in cash with the Commissioners and an assignment of the proceeds of an approved loan from the Federal Land Bank of $7,000.00, and also filed a petition for an accounting, in which he asked credit for the rental due him and damage for being divested of his farm and his farming operations destroyed, and also alleging that respondent's mortgage debt was usurious.

Upon hearing before the Commissioner, respondents were given full credit for all expenditures claimed, with six per cent interest annually, in addition to the mortgage debt with interest included. All claims of the petitioner for damage denied, allowing him only a credit for rental as an offset against respondent's total claim and decreeing that petitioner must pay the appraised value of $12,000.00 to save his farm the balance due respondents being $12,521.25. The accounting was made as in an ordinary action whereby the petitioner must pay his debt in full, principal and interest, less only $521.25, and is denied any and all relief afforded him under the bankruptcy act.

Also decrees respondents' mortgage is not usurious under the Wisconsin statute.

JURISDICTION

The jurisdiction of this court is sought to be invoked under the provisions of Title 28, Sec. 347 of the judicial Code.

A review is requested for the following reasons:

1st. The decree shows that the court approved the accounting which was made as in an ordinary action, giving the respondents credit for all expenditures claimed, with interest on same and on the mortgage debt at six per cent annually, when the record shows the estate insolvent, and gives said respondents credit for said full amount, less a deduction for the rental owing by them to petitioner's estate, whereby the total due respondents exceeds the appraised value and necessitates petitioner's paying same in full, less a nominal sum in excess of the appraised value.

2nd. Decrees that respondents' mortgage is not usurious under Wisconsin statute Sec. 115.05, which statute is, in substance, a duplicate of the Texas statute under which the Fifth Circuit Court held a mortgage usurious.

All of which involves a proper construction of said Sec. 75 as amended, contrary to many other decisions, and decrees the mortgage not usurious, contrary to said Circuit Court's decision, which decision will be accepted as a precedent, if an appeal is not granted.

STATUTES INVOLVED

Sec. 75-s (3) of bankruptcy Act states:

"(3) At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property of which he retains possession, including the amount of encumbrances on his exemptions, up to the amount of the appraisal, less the amount paid on principal: Provided, That upon request of any secured or unsecured creditor, or upon request of the debtor, the court shall cause a reappraisal of the debtor's property, or in its discretion set a date for hearing, and after such hearing, fix the value of the property, in accordance with the evidence submitted, and the debtor shall then pay the value so arrived at into court, less payments made on the principal, for distribution to all secured and unsecured creditors, as their interests may appear, and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor: Provided, That upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction. The debtor shall have ninety days to redeem any property sold at such sale, by paying the amount for which any such property was sold, together with 5 per centum per annum interest into court, and he may apply for his discharge, as provided for by this title. If, however, the debtor at any time fails to comply with the

provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years, the court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this title."

Wisconsin Code Section 115.05 MAXIMUM RATE

"No person, company or corporation shall, directly or indirectly, take or receive in money, goods, or things in action, or in any other way, any greater sum or any greater value, for the loan or forbearance of money, goods, or things in action, than at the rate of ten dollars upon one hundred dollars for one year; and in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest, unless an agreement to that effect is clearly expressed in writing, and signed by the party to be charged therewith."

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. The court committed error in allowing respondents interest on all indebtedness found due them, when the record shows that petitioner's estate was insolvent.

2. Allowed Respondents damages in the sum of $1,967.45 for the reconstruction of a large barn for use exclusively as a dairy barn, as found by

the commissioner, whereby its use was destroyed for general farming purposes.

3. Denied petitioner damage for destroying his farming operations, necessitating the sale of his farming equipment in a depressed market and the repurchasing of the same eight years later in a highly inflated market.

4. Denied petitioner any damage for having caused his confinement for fifty-nine days in a county jail under proceedings void for want of jurisdiction.

5. Denied petitioner damages for the cost of litigation and attorney fees.

6. Gave respondents credit for all improvements made prior to appraisement and which were included in the fixing of the value in the subsequent appraisement, and also allowed respondents credit for all such, whereby the respondents secured a repayment for said improvements in the appraised value, and were also given credit for the same as due them, and then found the amount still due them exceeded the appraised value in a nominal sum, thus giving a double credit in determining the appraised value, and the amount necessary to redeem.

7. Committed error in holding that petitioner had failed to make redemption and that the right so to do had expired, whereas, petitioner had deposited $5,300.00 in cash, had rental due him in the amount of $9,248.40, as was subsequently determined, and had assigned the proceeds of a

loan of $7,000.00, and the expiration of said right of redemption was tolled by the filing of a petition for an accounting.

8. Holding the mortgage was not usurious, contrary to the provisions of the Wisconsin statute and to a holding of the circuit court, of the Fifth Circuit.

9. That in so decreeing as above alleged the court, in substance, judicially repeals the Bankruptcy Act, whereby petitioner is denied the benefits thereof.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the U. S. Circuit Court of Appeals, Seventh District, commanding said court to certify and send to this court a full and complete transcript of the record and all proceedings of said circuit court of appeals in the above entitled cause, being No. 9837 on its docket, to the end that this cause may be reviewed and determined by this honorable court, as provided by Sec. 347, Title 28, of the Judicial Code, and that the judgment herein of said court of appeals be reversed by this honorable court, and for such other relief as this court may deem proper.

ERNEST NEWTON KALB
By R. BROWN, Attorney
Address: Creston, Iowa, and
John D. Voss, Attorney
Elkhorn, Wisconsin

SUPREME COURT OF THE UNITED STATES

October Term, 1949

In the Matter of:

ERNEST NEWTON KALB
Debtor

ERNEST NEWTON KALB
Petitioner

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN, Secured Creditors, and OSCAR JACOBSON, Trustee.

Respondents

BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinions of the United States District Court and of the United States Circuit Court of Appeals of the Seventh Circuit have not as yet

appeared in the official reports and therefore are printed in full in the Appendix postea.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Court is invoked on the following grounds:

1. That the court made an accounting as in an ordinary action, whereby the petitioner must, in substance, pay as in an ordinary action to save his farm and is denied all the benefits of said Sec. 75.

2. Holds that the respondents' mortgage was not usurious, contrary to the decision of the circuit court of the Fifth Circuit, which decision since its rendition in 1932 has been accepted as a precedent by practically all courts.

3. That, unless the jurisdiction of this court is invoked, said decision will result in a lack of harmony and in erroneous decisions in the future, decisions of both federal and state courts, whereby farmers will be denied the right of redemption, contrary to the intent of congress, as expressed in said Sec. 75 (s) and contrary to the construction of the same by this court.

SPECIFICATIONS OF ERROR

1. The court committed error in allowing creditors interest on all indebtedness found due them, the estate of debtor being insolvent.

2. Committed error in denying petitioner damages for the reconstruction of a large barn for use exclusively as a dairy farm, thereby destroying the use and value to him for general farming purposes.

3. Committed error in denying the farmer damages because of his farming operations being destroyed and necessitating the sale of his farm equipment in a depressed market and repurchasing of the same eight years later in a high, inflated market.

4. Committed error in denying petitioner damages for having caused him to be confined in a county jail for fifty-nine days under proceedings held void by this court.

5. Committed error in denying petitioner damages for the cost of litigation and attorney fees in defending the loss of his farm.

6. Committed error in allowing respondents a recovery for all improvements made while they were in possession and prior to the appraisement, and committed further error in allowing credit for the same in the accounting, whereby the petitioner was, in fact, twice charged with same in computing the amount necessary for him to pay in order to redeem his real estate.

7. Committed error in holding that appellant's right of redemption had expired within three years, as such was tolled by his filing a petition for an accounting.

8. Committed error in denying petitioner credit for the rental found due him as a payment on principal for the purpose of redemption.

9. Committed error in appointing a trustee to make sale of petitioner's real estate.

10. Committed error in not holding respondent's mortgage debt usurious.

ARGUMENT

As to 1:

The court committed error in allowing the respondents interest on any indebtedness found due them, as the record shows the estate was insolvent, debts being $19,921.00, assets $9,093.00, and there being a second mortgage on the real estate, whereby the principal mortgage indebtedness nearly totalled the appraised value.

City of New York v. Saper Trustees,
69 Sup. Ct. Rep. (Mch 1949) 554.
In re Oklahoma Railway Co., 61 Fed.
Supt. (1945) 96.
Kivoichi Fujikawa et al. v.
Sunrise Soda Water Works, 158 Fed. 2d
(1946) 490.
Johnson v. Norris, 1915 B, Lrans, 884.

As to 2:

Committed error in denying petitioner damage for the reconstructing of his large barn for use exclusively as a dairy barn, whereby its value

was largely destroyed to him not so engaged. Respondents are given credit for the cost of so doing, with interest in the sum of $1,967.45. To reconstruct it for general farming purposes will necessitate a similar expenditure.

Hawthorne v. Siegal, 88 Calif. 159,
22 Amr. St. Rep. (1891) 291
63 C. J., page 1013.

As to 3:

Committed error in denying petitioner damages for destroying his farming operations, necessitating the sale of all farm equipment in a greatly depressed market in 1936 and the repurchase of same eight years later, in 1944, in a high, inflated market, and necessitating his securing employment as a day laborer.

63 C. J. 1013.
Fridenheit v. Edmunsen, 36 Mo. 227, 88
Amr. Dec. 141.
Ottawa Gas Light, etc. Co. v. Graham,
28 Ill. 73, 81 Amr. Dec. 263.

As to 4:

Committed error in denying petitioner damages for the respondents having caused him to be confined for fifty-nine days in the county jail under proceedings held by this court to be void. The judgment was not as yet final, as petitioner was prosecuting his appeal to the Wisconsin Supreme Court, and did prosecute it from said court to this court, the United States Supreme Court,

wherein said proceedings were held to be void. Petitioner is not only entitled to damages for the reflection it cast upon his honor and intregrity, but is also entitled to damages for the permanent physical injury he suffered, as shown by the testimony of himself and wife, which was in no way refuted or denied.

63 C. J. 1036 and 1037.
Cody v. Lowry, 91 S.W. Rep. (Texas 1906) 1109.

As to 5:

Committed error in denying petitioner any recovery for the expense of all the litigation forced upon him, and for attorney fees, the conciliation Commissioner holding that all such must be proved, which was affirmed by both the District and the Supreme Court. The verified petition for accounting and the petitioner's testimony fixed the amount of his damages, and no testimony was offered in denial of same. Also testimony as to the cost of litigation is merely advisory to the court and is not binding on the court, it being the duty of the court to determine the reasonable cost of same.

63 C. J. 1026, 1035, 1036 and 1037.
Lurie et al. v. Steckel, 79 Fed Sup. 723.
Campbell v. Green, 112 Fed. 2d, 143.

As to 6:

Committed error in allowing the respondents credit in the accounting for all money and labor

spent on the farm during their eight years in possession, with interest annually thereon to date of the accounting. Credit was given for miscellaneous repairs, $1,440.86; labor and material, $1,967.45; a total of $3,408.31.

If such were judicially made, the value of the farm was increased accordingly and, therefore, was included in the subsequent appraisement, whereby the appraised value was increased in that amount. Not only were they so included in the appraised value, but the respondents were also given credit for the same on what they owed the petitioner in rental, whereby, in computing the amount necessary to redeem, they twice received credit for said expenditures. Those expenditures were made by respondents as trespassers and in violation of law. They were ordinary and unsecured claims against petitioner due from petitioner's estate and, as such, could not affect the amount necessary to redeem in the accounting.

The taxes and insurance were necessary to preserving the property. Respondents' mortgage provided a lien for all such paid and on rental, therefore, only the rental, the taxes and insurance paid could be considered in the accounting fixing the amount necessary to redeem.

The net taxes were $2,261.97; net insurance, $172.40; total, $2,434.37. Rental due petitioner's estate, $9,248.40; net rental owing by respondents, $6,814.03; petitioner's cash deposit, $5,300.00; total credit for redemption, $12,114.03.

The above seems to show conclusively that it was assumed the right of redemption had expired and that the accounting should be made as an ordinary accounting and not under the said Section 75.

Sec. 75-s-3 National Bankruptcy Act, USCA
Sec. 203-s-3.
Miscellaneous repairs, labor and material not a credit against rent.
In Re. 20 Fed. Sup. 240.

As to 7:

Committed error in holding that petitioner's right of redemption expired within three years, as such was tolled by debtor having filed his petition for an accounting.

Petitioner could not make a redemption until it was determined what amount he must pay to do so, and, after such was determined, then petitioner was entitled to a reasonable time to make such redemption. As was held in the Wright case by this court. In confirming the Commissioner's finding that the right of redemption had expired, and as petitioner was given thirty days to redeem, which has now expired, necessarily he is now completely barred of any right of redemption; and, unless this court grants this right, petitioner's real estate is lost to him.

Wright vs. Union Central Life Ins. Co.
311 U.S. 273, 61 Sup. Ct. Rep. 196.
Worley v. Wahlquist 150 Fed. 2d, 1007.
Wragg v. Federal Land Bank, 145 Fed. 2d, 816.

As to 8:

That petitioner was entitled to a credit in the amount of the rental due his estate on the appraised value, see the following:

Federal Land Bank v. Morrison, 133 Fed. 2d, 613.
Hepker v. Equitable Life Assurance Soc., 131 Fed. 2d, 926.

As to 9:

Commissioner had no authority to appoint a Trustee and order a sale, said Sec. 75-a-3 providing that the Court may so do and Chap. 1 "Definition" Par. (7) provides "Court" may include the Referee and the Amendment to Sec. 75 (a) Approved March 11, 1944, provides that the courts may appoint "Conciliation Commissioners" not Referees to be known as Conciliation Commissioners.

Amendment of March 11, 1944, to Sec. 75-a-b-c of Bankruptcy Act, U. S. Code 1940 Edition Supplement IV, Title 11, Section 203, U-SCA 203-a.

As to 10:

Committed error in holding that respondents' mortgage was not usurious. Wisconsin statute 115.05, as amended, provides there shall not be received, directly or indirectly, money, goods or things in action, or in any other way, or any greater sum or greater value for the loan or forbearance of money than ten per cent.

Prior to its amendment, the Wisconsin Supreme Court held that certain additional charges were a penalty, but, under the statute as amended, penalties would necessarily be included as interest. Nor does a court of equity have any authority to enforce a penalty or forfeiture.

In the Atwood case it cites the Shropshire case with approval, holding that anything received under such a statute, including the increase to be received for the forbearance of money, viz., because of default in payment, is necessarily interest.

Respondents' mortgage provides in the event of default it shall earn ten per cent, and also provides that he shall pay the taxes assessed on the mortgage note held by respondents, and will pay all expenses in the event of foreclosure, in addition to taxable costs; therefore, clearly more than ten per cent is exacted, and, since the Wisconsin statute makes everything received for the use or forbearance of money, it necessarily makes all such interest, even if in the nature of a penalty.

Respondents' debt is necessarily usurious for two certain reasons:

1. The Wisconsin statute makes everything of value received interest, which must include a penalty; and

2. If it is a penalty, it would be denied by a court of equity. For the Wisconsin Supreme Court to hold that such a mortgage is not usurious un-

der Section 115.05 would be as erroneous as was its holding heretofore that a state court could proceed with foreclosure proceedings, even though the defendant had proceedings pending under Section 75 in the Federal Court.

To correct that error certiorari was granted, and to correct the errors above enumerated certiorari should be again granted.

Wisconsin Statute, Sec. 115.05.
Atwood et ux. v. Deming Inv. Co., 55 Fed 2d, 180.
Shropshire et ux. v. Commerce Farm Credit Co., 30 S. W. Rep. (Texas) 282.
Ford v. Washington National Bldg. & Loan Asso., 10 Idaho, 30, 109 Amr. St. Rep. 192.
In Re Elmore Cotton Mills, 217 Fed. 810.
Green v. Grant, 96 N. W. Rep. (Mich.) 583.
Van Der Velde v. Wilson, 142 N.W. Rep. (Mich.) 553.
Union Guardian Trust Co. v. Crawford, 258 N.W. Rep. (Mich.) 248.
Miller v. Life Insurance Co., 118 N. Carolina, 612. 54 Amr. St. Rep. 741.

CONCLUSION

The Conciliation Commissioner, having found that the right of redemption had expired, then concluded that all rights under Section 75 (s) had terminated, and, therefore, it was his duty to make an accounting as in an ordinary action, and he thereupon made such. True, he concluded the

petitioner should have thirty days to make redemption; but, since the right of redemption under Section 75 (s) is adjudicated to be lost and the thirty days has expired, necessarily the petitioner has lost his farm, unless this court affords him protection.

If certiorari is denied, the decision will result in endless confusion, conflicting decisions, and in a very large measure a judicial repeal of the Act of Congress, viz., Section 75 (s).

Ernest Newton Kalb, Petitioner,
Sharon, Wisconsin.
R. BROWN, Address Creston, Iowa.
John D. Voss, Elkhorn, Wisconsin.
Attorneys for Petitioner.

Hon. Wm. Lemke (of Counsel)
Washington, D. C.

APPENDIX

Opinion and Findings of Geo. H. Belton, Conciliation Commissioner, as certified for review to the District Court and filed therein October 22, 1948.

(Omitting caption.)

"To the Honorable F. Ryan Duffy,
Judge of the United States District Court,
Eastern District of Wisconsin.

I, George H. Belton, Conciliation Commissioner for Walworth County, Wisconsin, do hereby certify that in the course of the proceedings in said cause before me, upon the hearing of the motion of Henry Feuerstein and Helen Feuerstein for the appointment of a trustee under the provisions of Section 75 (s) (3) of the Bankruptcy Act, as amended, and upon the petition of the farmer debtor for an accounting heard before me at the Court House in the City of Elkhorn, Walworth County, Wisconsin, on the 6th day of May, A.D. 1948, at ten o'clock A.M., the following questions were presented:

1. Did the farmer debtor fail to make redemption, as required by the Bankruptcy Act?

2. Ought a trustee to be appointed for the purpose of liquidating the bankrupt estate?

3. What is the amount due to the secured creditors Henry Feuerstein and Helen Feuerstein after off-setting against said amount the reason-

able rental value of the real estate for the period the secured creditors were in possession?

Upon considering the petition, and after the testimony offered by the parties, and considering the briefs and arguments of Counsel, I made the following orders, to-wit:

"The application of Henry Feuerstein and Helen Feuerstein, secured creditors, for an order appointing a Trustee under the provisions of Section 75 (s) (3) of the Bankruptcy Act, as amended, and the motion of the farmer debtor for an accounting, having come on to be heard pursuant to notice duly given, this 5th day of May, A.D. 1948; and J. Arthur Moran, attorney for Henry Feuerstein and Helen Feuerstein, secured creditors, and H. Brown and John D. Voss, attorneys for the farmer debtor, having appeared at said hearing; and the Conciliation Commissioner having heard the testimony of the parties and the arguments of counsel, does hereby make the following findings:

1. The farmer debtor originally filed a petition under Section 75 of the Bankruptcy Act on November 2, 1934. These proceedings were dismissed on June 27, 1935; reinstated on September 6, 1935; and finally dismissed on March 17, 1936.

2. The United States District Court, on April 16, 1940, refused to reinstate such proceedings, and such refusal was reaffirmed by the United States Circuit Court of Appeals in 116 Fed. 2d 775, and certiorari to the United States Su-

preme Court was denied in 313 U. S. 568.

3. New proceedings were then filed with the United States District Court on May 28, 1941.

4. Since March 12, 1936, until March 31, 1944, the secured creditors, Henry Feuerstein and Helen Feuerstein, were in the physical possession of the property.

5. The farmer debtor filed a new petition in this Court on May 28, 1941. Numerous proceedings were had in connection therewith, but on March 31, 1944, the farmer debtor was restored to the physical possession of his property, and was granted a three-year stay, and has been in possession of the real estate in question since that time. The real estate was appraised at Twelve Thousand ($12,000.00) Dollars, and the farmer debtor was ordered to pay an annual rental of Eight Hundred Forty ($840.00) Dollars.

6. The three-year stay expired on April 1, 1947.

7. On March 28, 1947, the farmer debtor deposited with the Conciliation Commissioner the sum of Fifty-three Hundred ($5,300.00) Dollars, and also filed a purported assignment of an application for a loan to the National Farm Loan Association in the amount of Seven Thousand ($7,000.00). Subsequent thereto, the National Farm Loan Associations advised the Conciliation Commissioner that the approval for the loan had been withdrawn.

8. The Conciliation Commissioner, therefore, finds that no redemption of the mortgaged premises, as provided for in the Bankruptcy Act, as amended, has been made, and that the three-year stay has expired.

9. The farmer debtor has requested an accounting to determine the amount due from the secured creditors as compension for the reasonable rental value for the premises during the period the secured creditors were in possession. Testimony of real estate brokers was offered by the creditors, Henry Feuerstein and Helen Feuerstein, fixing the value per acre of from five ($5.00) Dollars to Seven ($7.00) Dollars, during the period in question, to-wit: from 1936 to 1943, inclusive. Upon the testimony in the record, the Commissioner finds the real rental value of the real estate for the years 1936 to 1940, inclusive to be the sum of Seven Hundred Twenty ($720.00) Dollars per annum, and for the years 1941 to 1943, inclusive, to be the sum of Eight Hundred Forty ($840.00) Dollars. Allowing interest at Six (6%) Per Cent per annum, the rental charge is the sum of Nine Thousand Two Hundred Forty-eight and 40/100 ($9,248.40) Dollars. Attached hereto and marked Exhibit A is a tabulation not reproduced.

10. The farmer debtor also claims that moneys are due him from the secured creditors, Henry Feuerstein and Helen Feuerstein, on the following items:

(a) Damage to soil
(b) Damage to barn
(c) Purchase of personal property

(d) Damage to health of Kalb
(e) Attorneys fees paid by Kalb

11. The testimony in the record shows that the secured creditors, Henry Feuerstein and Helen Feuerstein, while they were in possession of the farm in question, cultivated, tilled, and cropped the farm in the usual and customary manner employed in and about the area where the farm is located, certain portions of the farm were seeded down, and commercial fertilizer was applied. The Commissioner is satisfied from the evidence in the record that the farm was properly cared for during the time that the secured creditors were in possession, and that no damage to the soil resulted from their occupancy.

12. So far as damage to the barn is concerned, the evidence shows that the secured creditors, Henry Feuerstein and Helen Feuerstein, expended the sum of One Thousand One Hundred Fifty ($1,150.00) Dollars in making the barn available for use as a dairy farm, and in installing stanchions and in making certain miscellaneous repairs. The Commissioner finds that no damage resulted to the barn by the repairs made by the secured creditors.

13. The farmer debtor claims that he had personal property on hand in 1936, which he was compelled to sell because of being evicted from the farm in question, and that when he regained possession, he purchased certain personal property, and that the difference between what he sold the personal property for in 1936, and what

he paid for the personal property he purchased in 1944, was Four Thousand Seventy-seven ($4,077.00) Dollars. This claim is not supported by the records in this and in the prior case, and is based upon mere speculation. The Commissioner finds that no damage resulted to the farmer debtor from the sale of personal property in 1936 and from the purchase of personal property in 1944.

14. So far as the farmer debtor's claim for damages to his health is concerned, there is no evidence in the record to support a finding that the farmer debtor sustained any damage to his health by reason of any act or omission of the secured creditors, Henry Feuerstein and Helen Feuerstein. Furthermore, that question was litigated in a case which was instituted by the farmer debtor in the Circuit Court for Walworth County against Roscoe R. Luce, Henry Feuerstein, and others, which resulted in a directed verdict in favor of the defendants, which verdict was affirmed by the Supreme Court in 239 Wis. 256 (1) N.W. (2-d) 176.

15. There is no evidence in the record as to the amount of attorneys fees expended by the farmer debtor, or for what purpose, and the Commissioner finds that the farmer debtor is not entitled to recovery for any attorneys fees expended by him.

16. The judgment of foreclosure against the real estate concerned in favor of Henry Feuerstein and Helen Feuerstein was entered on April, 21, 1933, in the amount of Seven Thousand Six

Hundred Four and 85/100 ($7,604.85) Dollars. Adding interest at Six (6%) Per Cent from that date to the date of hearing, in the amount of Six Thousand Nine Hundred and 15/100 ($6,900.15) Dollars makes a total of Fourteen Thousand Five Hundred Five ($14,505.00) Dollars, which the Commissioner finds is owed by the farmer debtor to the said secured creditors on the mortgage foreclosure judgment.

17. The secured creditors, Henry Feuerstein and Helen Feuerstein, on March 31, 1936, paid and discharged the back taxes against the property in question in the amount of Nine Hundred Thirty-three and 50/100 ($933.50) Dollars, and paid the annual taxes as they matured for the years 1936 to 1943, inclusive. Accruing interest at Six (6%) Per Cent on the amount of said taxes makes a total due for taxes and interest thereon of Three Thousand Five Hundred Ninety-five and 26/100 ($3,595.26) Dollars, which the Commissioner finds is due and owing to the secured creditors, all as appears by Exhibit B, a tabulation not reproduced.

18. During the years 1936 and 1943, inclusive the secured creditors, Henry Feuerstein and Helen Feuerstein, paid the fire and extended coverage insurance on the buildings on said property, in the total amount, including interest at Six (6%) Per Cent, of Two Hundred Sixty-one and 08/100 ($261.08) Dollars, which the Commissioner finds is due and owing to the secured creditors, as more particularly appears from Exhibit B, a tabulation not reproduced.

19. At the time of the hearing, the secured creditors, Henry Feuerstein and Helen Feuerstein, testified as to repairs and improvements made upon the buildings on said premises, including new fencing. The Commissioner finds that such repairs were necessary to preserve and maintain said farm, and that there is due and owing to the secured creditors the sum of One Thousand Four Hundred Forty and 86/100 ($1,440.86) for miscellaneous repairs, and the sum of One Thousand Nine Hundred Sixty-seven ($1,967.00) Dollars for repairs on the farm, including interest, all as appears by Exhibit B, a tabulation not reproduced.

20. The Commissioner therefore finds that there is due and owing to Henry Feuerstein and Helen Feuerstein, the sum of Twenty-one Thousand Seven Hundred Sixty-nine and 65/100 ($21,769.65) Dollars, and that the farmer debtor is entitled to off-set against said sum the reasonable rental value of said farm during the period in which the said secured creditors were in possession, in the sum of Nine Thousand Two Hundred Forty-eight and 40/100 ($9,248.40) Dollars, leaving a balance due to Henry Feuerstein and Helen Feuerstein of Twelve Thousand Five-Hundred Twenty-one and 25/100 ($12,521.25) Dollars.

Dated at Elkhorn, Wisconsin, this 22nd day of June, A. D. 1948.

GEORGE H. BELTON
Conciliation Commissioner."

"It appearing in this case that the debtor has failed to comply with the provisions of Section 75 of the Bankruptcy Act, in that he has failed to re-finance himself within three (3) years as provided by law;

Now, Therefore, It is Ordered, That Oscar Jacobson, Route 2, Elkhorn, Walworth County, Wisconsin, be and he hereby is appointed Trustee under the provisions of Section 75 (s) (3) of the Bankruptcy Act, and his bond is fixed in the sum of Twelve Thousand ($12,000.00) Dollars.

It is Further Ordered, That unless the debtor, within thirty (30) days after the date hereof, which is fixed as a reasonable time, redeem the property in question by payment of the appraised value of Twelve Thousand ($12,000.00) Dollars into the Court, that the Trustee file a petition for the sale or other disposition of the property belonging to the farmer debtor, and that such further proceedings be had with reference thereto as are provided by the Bankruptcy Act in such case made and provided.

Dated this 22nd day of June, A.D. 1948.

GEORGE H. BELTON,
Conciliation Commissioner."

ORDER AND DECREE OF DISTRICT COURT

Order Confirming Order and Findings of Conciliation Commissioner on hearing had in United States District Court Before Hon. F. Ryan Duffy, Judge (Omitting Caption, Recites).

"This matter was heard upon the certificate of George H. Belton, Conciliation Commissioner, and upon the farmer debtor's petition for a review of findings and an order made by said Conciliation Commissioner dated June 22, 1948 (said findings having been made with respect to application of the farmer debtor for an accounting and damages claimed by him against Henry Feuerstein and Helen Feuerstein, secured creditors, and said order appointing Oscar Jacobson as trustee, etc.), and the court having considered the same, together with the records, files and proceedings applicable thereto, and also having considered the arguments and briefs of counsel and being fully advised.

It Is Ordered: That said findings and said order of the Conciliation Commissioner be and the same are in all things confirmed.

Dated at Milwaukee, Wisconsin, this 3rd day of February, A.D. 1949.

(Signed) F. RYAN DUFFY,
Judge."

Endorsed: Filed Feb. 3, 1949.
B. H. Westfahl, Clerk.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 549

In Bankruptcy

In the Matter of:

ERNEST NEWTON KALB,

Debtor,

ERNEST NEWTON KALB,

Petitioner,

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN, Secured Creditors, and OSCAR JACOBSON, Trustee,

Respondents.

RESPONDENTS' BRIEF
In Opposition To Petition For Writ Of Certiorari

J. ARTHUR MORAN,
Delavan, Wisconsin,
Counsel for Respondents.

HAMMERSMITH-KORTMEYER CO.
MILWAUKEE

INDEX

	Page
Statement	1
Summary of Argument	9
Conclusion	29

Argument:

I. Redemption of the real estate was not timely made	9
II. Interest on the claim of Henry and Helen Feuerstein, secured creditors was properly allowed	12
III. The conciliation commissioner did not err in denying the farmer debtor damages because of the repair of the barn on the premises in question, or in denying the farmer debtor damages arising out of the sale and repurchase of certain personal property and his findings are amply supported by the evidence	15
IV. All questions of damages arising out of the Petitioner's alleged false imprisonment have been fully litigated, or are now outlawed by the Wisconsin Statute of Limitations	17
V. There is no evidence in the record upon which the conciliation commissioner could base an award to the Petitioner for attorney fees and litigation costs	18
VI. A mortgagee in possession is entitled to reimbursement for reasonable expeditures made by him to preserve the premises such as insurance, taxes and repairs	18
VII. The sum found as a reasonable rental for the period the secured creditors were in posses-	

Page

sion was properly held to be a credit against the gross amount due from the Petitioner..... 19

VIII. The conciliation commissioner had the power to appoint a trustee 23

IX. The note and mortgage constituting the basic subject matter of this controversy were not usurious 24

X. The conciliation commissioner's findings upon questions of fact must be sustained unless those findings are contrary to the clear weight of the evidence 26

LIST OF AUTHORITIES CITED

Table of Cases

Adair v. Bank of America, 303 U.S. 350 23

Alpine Petroleum Corp., In re, 41 F. 2d 682..... 14

Federal Land Bank v. Castanien, 116 Fed. 2d 589.... 23

Federal Land Bank v. Morrison, 133 Fed. 2d 613.... 21

Gotham Can Co., In re, 48 Fed. 2d 540..... 14

Kalb, In re, 54 F. Supp. 535 4

Kalb, In re, 116 F. 2d 775 4

Kalb, In re, 313 U.S. 568; 61 S.Ct. 940; 85 L.Ed. 1526 4

Kalb, In re, 7 Cir., 127 F. 2d 509 4

Kalb v. Feuerstein, 308 U.S. 433; 60 S.Ct. 343; 84 L.Ed. 370 3

Kalb v. Luce, 239 Wis. 256; 1 N.W. 2d 176 .....4, 17

Page

Kalb v. Luce, et al, 231 Wis. 186; 285 N.W. 431..... 17

Kalb v. Luce, et al, 234 Wis. 509; 291 N.W. 841..... 17

Kauk v. Anderson, 137 Fed. 2d 331 27

Lynch v. Ryan, 137 Wis. 13; 118 N.W. 174..... 19

Nellies, In re, 61 F. Supp. 796 11

Peoples Homestead Assn. v. Bartlette, 33 F. 2d 561.. 13

Randall v. Home Loan & Investment Co., 244 Wis. 623; 12 N.W. 2d 915 25

Wiedmer, In re, 82 F. 2d 566 23

STATUTES AND TEXT BOOKS CITED

Bankruptcy Act, Section 75(s) (3).....4, 8, 10, 18, 21, 23

General Order L (11) 23

General Order XLVII 26

Remington Bankruptcy, Vol. 2, P. 434 13

Remington Bankruptcy, Vol. 8, P. 32 27

Remington Bankruptcy, Vol. 10, P. 18 23

Wisconsin Statutes, Section 330.19(5) 7, 17

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1949

No. 549

In Bankruptcy

In the Matter of:

ERNEST NEWTON KALB,

Debtor,

ERNEST NEWTON KALB,

Petitioner,

vs.

HENRY FEUERSTEIN and HELEN FEUERSTEIN, Secured Creditors, and OSCAR JACOBSON, Trustee,

Respondents.

RESPONDENTS' BRIEF

In Opposition To Petition For Writ Of Certiorari

STATEMENT OF FACTS

The statement of facts in the Petitioner's brief, (Pages 3 and 4), are substantially correct.

Counsel believes, however, that a brief statement of the history of this litigation may be helpful.

This litigation arises out of the execution of two promissory notes by the Petitioner, payable to the Respondents, Henry and Helen Feuerstein, in the amount of Six Thousand ($6000.00) Dollars, dated March 6, 1923, and secured by a first mortgage on the farm which is the subject matter of this litigation.

Foreclosure of that mortgage was commenced on the 9th day of March, 1933, and a judgment of foreclosure and sale was rendered on the 21st day of April, 1933, by the County Court of Walworth County, Wisconsin, in the amount of Six Thousand ($6000.00) Dollars principal, interest in the amount of Twelve Hundred Thirty-two and 57/100 ($1232.57) Dollars, Two Hundred Eighty ($280.00) Dollars attorney fees, and costs and disbursements of Eighty-seven and 28/100 ($87.28) Dollars. The record shows that the taxes on the premises were then delinquent in the amount of about Seven Hundred ($700.00) Dollars.

The Petitioner availed himself of the then moratorium Statutes of the State of Wisconsin, with the result that sale of the premises was deferred until October 25, 1934.

On October 25, 1934, an order was entered staying the proceedings in the County Court of Walworth County because of the fact that the Petitioner had filed a petition in the District Court under the so-called Frazier-Lemke Act.

A meeting of creditors was held subsequently, but no further proceedings were had under the so-called Frazier-Lemke Act, and on July 20, 1935, pursuant to an order previously entered, the sale was held, and the premises conveyed to Henry Feuerstein, one of the Respondents. A Sheriff's Deed was executed and delivered, but at the request of the Petitioner, confirmation of the

sale was delayed until September 16, 1935, when an order confirming the sale was entered.

Prior to that time, and on the 27th day of June, 1935, an order was entered in the District Court, dismissing the Petitioner's petition because of the unconstitutionality of the original Frazier-Lemke Act. On September 6, 1935, an order was entered in the District Court reinstating the Petitioner's petition as of October 2, 1934.

On March 12, 1936, a Writ of Assistance was duly executed by the Sheriff of Walworth County, and the Respondent, Henry Feuerstein was placed in possession of the farm.

On March 17, 1936, an order was entered in the District Court, dismissing the Petitioner's petition. Thereafter, the Petitioner started two actions in the State Courts, one praying for judgment expunging the Sheriff's Deed, and restoring the Petitioner to possession of his farm, and the other for damages against the Judge who granted the Writ of Assistance, the Sheriff who executed the same, and the Respondents for the loss of use of the farm, assault, and for false imprisonment. Both of these cases were decided in favor of the Respondents and the other defendants, and against the Petitioner, and the lower Court was affirmed by the Supreme Court of the State of Wisconsin. On a subsequent appeal to the Supreme Court of the United States, it was held that the mere filing of a petition under the so-called Frazier-Lemke Act conferred exclusive jurisdiction upon the Federal Courts, and ousted all other Courts of the power to maintain and enforce foreclosure proceedings, and the case was remanded to the Supreme Court of the State of Wisconsin for further proceedings. *Kalb v. Feuerstein,* 308 U.S. 433; 60 S.Ct. 343; 84 L.Ed. 370.

Thereafter, the action in which the Petitioner sought to recover damages was tried in the Circuit Court for Walworth County, and a directed verdict in favor of the Respondents and others was granted. Upon appeal to the Supreme Court of the State of Wisconsin, on December 2, 1941, *Kalb v. Luce,* 239 Wis. 256, the action of the State Court was affirmed.

On March 18, 1940, the Petitioner filed an amended petition requesting the reinstatement of the petition by him filed on October 2, 1934, and moved for rehearing of the order of dismissal entered March 17, 1936.

The Honorable F. Ryan Duffy, District Judge, refused to reinstate such proceedings, and denied the motion for rehearing; In *re Kalb,* 54 F.Supp. 535. The decision of the District Court was affirmed by this Court, 116 F. 2d 775, and certiorari was denied, 313 U.S. 568, 61 S.Ct. 940, 85 L.Ed. 1526.

A new petition listing substantially the same assets and creditors was then filed in the District Court on May 28, 1941. A motion was made by the Respondents to strike the real estate from the schedule. That motion was denied by the District Court, which decision was affirmed by the Circuit Court of Appeals, 7 Cir., 127 F. 2d 509.

The farmer debtor thereupon was adjudicated under Section 75, Sub. (s) of the Bankruptcy Act of April 2, 1943. The Conciliation Commissioner entered an order fixing the annual rental, and entered an order staying the proceedings for a period of three (3) years, conditioned upon the payment of that rental.

Following the expiration of the three year stay, the secured creditors moved for the appointment of a trustee, and for an order directing the sale of the mortgaged premises.

The farmer debtor filed a petition asking that the Conciliation Commissioner find that redemption had been made; that the mortgage in question was usurious; and for an accounting.

A formal hearing was had, testimony was taken, and the Conciliation Commissioner thereafter made the findings, and entered the orders which are now before the Court for review.

The Conciliation Commissioner in his order dated June 22, 1948, and concerning which, a petition for review has been filed by the farmer debtor, made the following findings:

(a) That the three-year stay proceedings expired on April 1, 1947. (R-62)

(b) That redemption of the mortgaged premises was not made within the three-year period. (R-62)

(c) That the reasonable rental value of the farm during the period that the secured creditors were in possession, including interest, was Nine Thousand Two Hundred Forty-eight and 40/100 ($9,248.40) Dollars. (R-62)

(d) That the secured creditors properly tilled and cared for the soil and said farm while they were in possession. (R-63)

(e) That certain repairs made by the secured creditors did not damage the barn on said farm. (R-63)

(f) That the claim of the farmer debtor that he sustained damage by being compelled to sell certain personalty was not supported by the records and was speculative. (R-63)

(g) That there was no evidence in the record to support a finding that the farmer debtor had sus-

tained any damage to his health by reason of any act or omission of the secured creditors. (R-63)

(h) That the farmer debtor is not entitled to recover attorney fees expended by him. (R-64)

(i) That there is due upon the judgment of foreclosure including interest, the sum of Fourteen Thousand Five Hundred Five ($14,505.00) Dollars. (R-64)

(j) That there is due to the secured creditors for real estate taxes paid by them, including interest, the sum of Three Thousand Five Hundred Ninety-five and 26/100 ($3,595.26) Dollars. (R-64)

(k) That there is due to the secured creditors for fire insurance premiums paid by them, including interest, the sum of Two Hundred Sixty-one and 08/100 ($261.08) Dollars, and for necessary repairs to preserve and maintain said farm, the sum of One Thousand Four Hundred Forty and 86/100 ($1,440.86) Dollars, and for general repairs, the sum of One Thousand Nine Hundred Sixty-seven and no/100 ($1,967.00) Dollars. (R-64, 65)

(l) That the net balance due to the secured creditors after allowing an offset to the farmer debtor, is the sum of Twelve Thousand Five Hundred Twenty-one and 25/100 ($12,521.25) Dollars. (R-65)

The findings of the Conciliation Commissioner were reviewed and confirmed by the District Court, Honorable F. Ryan Duffy, presiding.

On appeal to the Circuit Court of Appeals, the judgment of the District Court was affirmed.

SUMMARY OF ARGUMENT

I.

Redemption of the real estate was not timely made in view of the failure of the farmer debtor to pay into Court, the appraised value of the real estate in cash prior to expiration of the three year period provided for in Section 203 (s).

II.

Interest on the secured claim of Henry and Helen Feuerstein was properly allowed in order to determine the total sum due to the secured creditors.

III.

The Conciliation Commissioner did not err in denying the farmer debtor damages because of the repair of the barn on the premises in question, or in denying the farmer debtor damages arising out of the sale and re-purchase of certain personal property, and his findings are amply supported by the evidence.

IV.

A portion of the farmer debtor's claim is predicated upon an alleged false imprisonment which occurred on March 12, 1936. Such a cause of action, if one existed, is barred under Section 330.19(5) of the Wisconsin Statutes which provides that actions to recover damages for injuries to the person must be commenced in six years. Furthermore, this phase of the matter was fully litigated in the State Courts.

V.

No evidence was tendered upon which the Conciliation Commissioner could have based an award for attorney fees and litigation expense.

VI.

The mortgagee, while in possession, was required to make expenditures for necessary repairs, insurance, and taxes in order to preserve the premises, and was entitled to credit for those expenditures in the accounting between the parties.

VII.

The Conciliation Commissioner properly found that the reasonable rental value of the property while the mortgagees were in possession should be offset against the gross amount due from the farmer debtor to the mortgagees.

VIII.

A Conciliation Commissioner has the same jurisdiction and authority as a general referee, and in addition, the powers conferred upon them by Section 75. That the Conciliation Commissioner had the power to appoint a trustee necessarily follows.

IX.

The note and mortgage were not usurious. Added interest, costs and attorney fees maturing after default are not interest, but a penalty and do not render a note and mortgage otherwise valid, usurious.

X.

The findings of the Conciliation Commissioner were upon questions of fact, and must be sustained unless they are clearly erroneous.

ARGUMENT

I.

Redemption of the Real Estate Was Not Timely Made.

The contention of the farmer debtor that redemption was timely made is without merit.

The facts concerning the purported redemption are not disputed. On March 28, 1947, the farmer debtor paid to the Conciliation Commissioner the sum of $5300.00 and filed what purported to be an assignment of the proceeds of a loan to be consummated in the future. The assignment was not signed by the farmer debtor's wife, or consented to by the proposed mortgagee, the National Farm Loan Association of Janesville, Wisconsin. Attached to the assignment was a letter reading as follows:

"National Farm Loan Association

Janesville, Wisconsin
March 28, 1947

Mr. George Belton
Conciliation Commissioner
Elkhorn, Wisconsin
Dear Mr. Belton:

Mr. Ernest Kalb has made an application for a Federal Land Bank loan and has obtained a Federal Land Bank Loan in the amount of $7,000.00, with the instructions 'pay liens on security offered, outside financing permitted—not to exceed $2,000.00.' Mr. Kalb has called at the office and informs me

that he will be able to use the commitment which the Federal Land Bank has offered him and that he has sufficient resources to make up the difference and comply with the Land Bank's commitment. When you will arrange to furnish us with the abstract continued to date, we will be in a position to furnish Mr. Kalb with the proceeds of his loan.

Yours very truly,

(Signed)

J. M. BARRY
Secretary-Treasurer"

The assignment was not irrevocable. Neither was the commitment of the National Farm Loan Association. In fact, the original commitment was cancelled on October 24, 1947. It is contended that the commitment has been reinstated although the record does not show that fact.

The making of such assignment did not constitute a redemption of the mortgaged premises.

The specific language of Section 75 (s) (3) provides:

"At the end of three years, or prior thereto, the debtor may pay into Court the amount of the appraised value of the property of which he retains possession, including the amount of encumbrances, on his exemptions, up to the amount of the appraisal, less the amount paid on principal."

The language of the Act is clear and mandatory, and is capable of only one construction, and that is, that the farmer debtor must pay the appraised value into court, in cash or its equivalent. The farmer debtor had three years in which to arrange his financing. He was not required to wait until the last day of the redemption period

to do so. The assignment of the proceeds of a mortgage that might never be executed is not a compliance with either the letter or the intent of the quoted section.

In the case of *In re Nellies,* 61 F. Supp. 796, the farmer debtor deposited the amount of the appraised value of the real estate in a bank pending delivery of a deed.

The court in holding that redemption had not been made, said,

> "The statute is clear to the effect that in order to entitle the debtor to a redemption the debtor must 'pay into court the amount of the appraisal.' If the debtor complies with the requirement of the statute 'the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor.' That is, under the statute the debtor pays the money into court and secures title by an order of the court. In the present instance the debtor has paid no money into court. The court is advised that she has arranged an outside escrow for an amount equal to an appraisal of a portion of the property of which she retained possession. She asks not title through an order of the court but instead demands a conveyance directly from the secured creditor and also title insurance.
>
> * * *
>
> In any event neither the letter nor the spirit of the law would justify this court in giving to this bankrupt the right to so materially amend the statute as to allow her to substitute 'an escrow holder' for the court and to demand title insurance from the secured creditor rather than title through court order as specified by the statute. To permit this bankrupt to so substantially amend the statute would establish a precedent for increasing departures from the statute by subsequent farmer-debtors. Some later farmer debtor instead of selecting a bank as escrow holder

might designate some individual, contending that he should have as much right to designate his escrow holder as the instant bankrupt should to designate hers. In any event it is Congress rather than the bankrupt of this court which has the sole power to amend the statute. The present requirement that the money be paid into court is definite and positive.

No money having been paid into court and the farmer debtor having demanded a conveyance of the real estate and title insurance from the creditor rather than by court order, this court must hold that the bankrupt is not entitled to the real property."

The rule stated is applicable here. It is obvious that redemption was not made.

II.

Interest on the Claim of Henry and Helen Feuerstein, Secured Creditors, Was Properly Allowed.

The conciliation commissioner did not err in allowing interest on the claim of the secured creditor.

A verified claim was duly and timely filed covering the principal sum of the foreclosure judgment plus interest; taxes paid by the mortgagee, including interest; repairs and improvements, made by the mortgagee, and insurance premiums paid to protect the property.

The proceeding sought to be reviewed was in part an accounting requested by this mortgage debtor, for the purpose of determining the net amount due to the secured creditors. The conciliation commissioner allowed both parties, both the farmer debtor and the secured creditor interest on their respective claims. It is not contended by the secured creditors that they can recover more than the appraised value of the farm if the farmer debtor

makes redemption as provided for in the order of the conciliation commissioner. Nor is it contended by them that they have any claim against any of the assets of the bankrupt estate except the real estate in question.

It will not be seriously urged that the value of the real estate is less than the net amount due to the secured creditors.

That the conciliation commissioner did not err in allowing interest on the secured creditors claim is clearly established by prior adjudications.

In (2) Rem. Bankruptcy, at P. 434, it is stated,

> "It has never been suggested that a creditor is not entitled to interest accruing up to the very date of the payment to him of the proceeds of his security if the proceeds are sufficient to satisfy his entire claim. Any other result would involve the destruction in part of valid liens."

This rule is supported by the case of *People's Homestead Association v. Bartlette,* 33 F. (2nd) 561, where the court said,

> "We are of the opinion that appellant was entitled to its interest on its mortgage up to the date of the completed sale. That sale was not complete until the purchaser had complied with his bid by paying the purchase price. Section 67(d) of the Bankruptcy Act (11 U.S.C.A., Section 107) provides that liens given or accepted in good faith shall not be affected by that act. In Coder v. Arts, 152 F. 943, 15 L.R.A. (N.S.) 372, the Circuit Court of Appeals for the Eighth Circuit, in an opinion by Judge Sanborn, held that, 'where a trustee sells mortgaged property of the bankrupt's estate free of the mortgage, and the proceeds of the sale are sufficient for that purpose, the mortgagee is entitled to payment of interest

upon his mortgage debt as well as the principal, out of the proceeds in accordance with the terms of the note and mortgage.'

In support of that ruling, Thompson v. Fairbanks, 196 U.S. 516, 25 S.Ct. 306, 49 L.Ed. 577, was cited. The Supreme Court in affirming Coder v. Arts, 213 U.S. 223, 245, 29 S.Ct. 436, 445 (53 L.Ed. 772, 16 Ann. Cas. 1008, said: 'Nor do we think the Circuit Court of Appeals erred in holding that, inasmuch as the estate was ample for that purpose, Arts was entitled to interest on his mortgage debt.' Sexton v. Dreyfus, 219, U.S. 339, 31 S.Ct. 256, 55 L.Ed. 244, relied on by appellee, is not in conflict with the view indicated by the just quoted language. In that case the secured creditors had exhausted their security, and as to the fund in court were unsecured creditors. In Coder v. Arts, as in this case, the secured creditor had not exhausted his security, and sought to be paid, not out of a general fund that belonged to the unsecured creditors, but out of a special fund derived solely from the sale of his security. See San Antonio Loan & Trust Co. v. Booth (C.C.A.) 2 F. (2nd) 590."

To the same effect are the following cases:

In re Gotham Can Co., 48 F. (2d) 540.

In re Alpine Petroleum Corp., 41 F. (2d) 682.

The mortgage judgment in question provided that the mortgagee might pay all taxes and insurance and add such sums so paid to the judgment. Consequently the inclusion of those sums by the Conciliation Commissioner in his accounting was proper.

III.

The Conciliation Commissioner Did Not Err in Denying the Farmer Debtor Damages Because of the Repair of the Barn on the Premises in Question, or in Denying the Farmer Debtor Damages Arising Out of the Sale and Re-purchase of Certain Personal Property, and His Findings Are Amply Supported by the Evidence.

The Conciliation Commissioner did not err in denying the debtor any compensation for being divested of his property other than the allowance of reasonable rental value during the time the debtor was out of possession.

The farmer debtor was entitled to have determined the reasonable rental value of the land during the time he was out of possession and this the Conciliation Commissioner did, although we feel that the value as found is excessive, in the light of the uncontradicted evidence and especially in view of the testimony given by two impartial and qualified experts. (R-50, 51, 52, 53, 54.)

The farmer debtor claimed that the barn had been damaged (R-15, 16, 17, 18, 19,) because it had been converted from a stock feeding shed and hay storage barn to a modern dairy barn.

Objection to the reception of any testimony on this subject was made on the ground that the claim involved an alleged tort which could only be determined in a judicial proceeding where the secured creditors would be entitled to a jury trial.

Even assuming that the testimony was admissible, it still falls far short of establishing that the barn was in anywise damaged. On the contrary the evidence establishes (R-42, 43, 44, 45, 46) that the value of the barn

was increased by the repair work done on it by the secured creditor. Furthermore, had it been depreciated in value, the decrease would have been reflected in a lower appraisal value.

The farmer debtor further contended that the farm had not been properly operated during the period the secured creditors were in possession and that its fertility had been destroyed, but offered no testimony to support such contention. On the contrary, the testimony of the tenant (R-46, 47) showed that the farm was operated as other farms were operated in the area, and that crops were rotated, some seeding was done every year, and commercial and natural fertilizer was applied every year.

The farmer debtor also attempted to substantiate an item of $4,077.00 (R-20, 21), purporting to be a loss arising out of the difference between personalty sold by him in 1936 and personalty purchased by him in 1944. Testimony of this character was received subject to counsel's objection. The Conciliation Commissioner found that this claim was not supported by the records in this and in the prior proceedings and is based upon mere speculation. Counsel suggests further that there is no credible evidence upon which any finding in favor of the farmer debtor could be made.

There is no testimony as to relative age, condition or value of the property sold or the property purchased. Furthermore, it is a matter of common knowledge that the price of farm machinery, crops and livestock increased between 1936 and 1944, and that these items have greatly increased since 1944, so that undoubtedly the farmer debtor could sell out today at a handsome profit. The finding that this claim is based upon mere speculation is amply justified.

IV.

All Questions of Damages Arising Out of the Petitioners Alleged False Imprisonment Have Been Fully Litigated, or Are Now Outlawed by the Wisconsin Statute of Limitations.

Any claim which the Petitioner asserts for damages to his person has been fully litigated and is barred by the Wisconsin Statute of Limitation. The Petitioner introduced testimony, subject to the Respondent's objection (R-25, 39, 40, 41, 42) to support a claim for damages to his person, alleged to have been caused by confinement in the County Jail of Walworth County.

The subject matter involved in this contention was considered in *Kalb v. Luce,* et al, 231 Wis. 186, 285 N. W. 431; 234 Wis. 509, 291 N.W. 841, and was finally disposed of in 239 Wis. 256, 1 N.W. (2d) 176, and is now res adjudicata.

Even if it were not, that cause of action, having accrued on March 12, 1936, is long since outlawed under Section 330.19(5) of the Wisconsin Statutes, which reads in part as follows:

"330.19. Within six years.

(5) An action to recover damages * * * for injuries to the person * * * of another."

The Conciliation Commissioner found, in connection with this contention (R-63) that there was no evidence in the record to support a finding that the farmer debtor sustained any damage to his health by reason of any act or omission of or by the secured creditors, and further found that the question had been fully litigated.

These findings are amply supported and should be affirmed.

V.

There is No Evidence in the Record Upon Which the Conciliation Commissioner Could Base an Award to the Petitioner for Attorney Fees and Litigation Costs.

There is no evidence whatever in the record upon which the Conciliation Commissioner could base an award to the Petitioner for attorney fees and costs. It is true that a Conciliation Commissioner, referee or judge has a wide discretion in determining the amount, or the reasonableness of attorney fees to be allowed. But here there has been no showing whatever upon which the commissioner could base an award.

As a matter of fact, most of the litigation which he prosecuted was wholly unnecessary and meaningless in view of the fact that his petition, under Section 75, was dismissed on March 17, 1936, and all proceedings in the State Courts were resolved against him.

VI.

A Mortgagee in Possession is Entitled to Reimbursement for Reasonable Expenditures Made By Him to Preserve the Premises Such as Insurance, Taxes and Repairs.

The farmer debtor maintains that the conciliation commissioner erred in allowing the secured creditors credit for moneys expended in repairs on the farm in question. The testimony, (R-43, 44, 45, 46, 47, 48, 49, 50) shows that at the time the secured creditors took possession of the farm, all of the buildings were badly in need of paint. There was no cistern pump and no kitchen sink. There were no eavestroughs on the house. One hundred forty-

six (146) rods of fence had to be constructed at a cost of Two ($2.00) Dollars per rod. There was no floor in the barn. The interior of the house had to be decorated. Mr. Feuerstein, one of the secured creditors, testified that the work done on the buildings was reasonably necessary to maintain them in a good state of repair.

The general rule in Wisconsin for more than forty (40) years has been that a mortgagee in possession is entitled to reimbursement by the owner of the right of redemption for his reasonable expenditures to preserve the property, such as taxes and repairs. (*Lynch v. Ryan,* 137 Wis. 13, 118 N.W. 174.

The Conciliation Commissioner found that the secured creditors were entitled to reimbursement for taxes and insurance paid and the sum of $1440.86 expended in making repairs necessary to maintain said farm in a good state of repair.

The Conciliation Commissioner's findings were justified under the evidence.

VII.

The Sum Found as a Reasonable Rental for the Period the Secured Creditors Were in Possession Was Properly Held to Be a Credit Against the Gross Amount Due from the Petitioner.

The Petitioner apparently contends that he is to have a credit against the appraised value for the amount determined as a reasonable rental for the period the Respondents were in possession, but is not to be charged for any of the items found in favor of the Respondents by the Conciliation Commissioner.

In other words, if we correctly understand the farmer debtor's position, he contends that he is entitled in these proceedings to have all and singular his debts discharged and yet retain all or a portion of his assets.

On July 16, 1941, at 11:00 o'clock A.M. the farmer debtor filed an application for leave to amend his petition and scheduled by inserting in Schedule B-3, his unliquidated claim for damages against Henry Feuerstein and Helen Feuerstein. The application was granted.

That portion of the schedule as amended reads as follows:

> UNLIQUIDATED CLAIMS OF EVERY NATURE WITH THEIR ESTIMATED VALUE:
>
> Damages due from Henry Feuerstein and Helen Feuerstein for the unlawful eviction of the farmer debtor from the use and possession of the following described premises* on March 12, 1936, and for the unlawful use and possession of said premises from March 12, 1936, up to the present time, said Henry Feuerstein and Helen Feuerstein still remaining unlawfully in possession of said premises.
>
> *The northwest quarter of the northwest quarter and the north half of the southwest quarter of the northwest quarter of Section 14, and the northeast quarter of the northeast quarter and the north half of the southeast quarter of the northeast quarter of Section 15, all in Town 1, North, Range 15 East, Walworth County, Wisconsin, being 120 acres more or less.
>
> Said premises are the same premises as are described in Schedule A-2, being mortgaged to said Henry Feuerstein and Helen Feuerstein in the amount of $7500.00
>
> Said eviction and taking of possession was held unlawful in Kalb v. Feuerstein, 308 U.S. 433. The farmer debtor has been damaged as a direct and

proximate result of said unlawful eviction use and possession, and loss of rents and profits of said premises in the sum of $25,893.00. As said unlawful possession still continues the farmer debtor's damages necessarily continue to the time of restoration of the premises to him.

$25,893.00

The farmer debtor having been adjudicated a bankrupt, all of his assets, except those exempt by law from execution, passed into the control of the Bankruptcy Court to be dealt with as in another bankruptcy matter.

Counsel relies upon the case of *Federal Land Bank v. Morrison,* 133 Fed. (2d) P. 613.

That case is not in point. The facts in that case briefly stated are that in 1933 receivers were appointed in a state court foreclosure proceedings. In 1935, a petition was filed under Section 75 of the Bankruptcy Act. After the enactment of the present Section 75 (s) the proceedings were reinstated on Feb. 20, 1940. The receivers had been in possession during the interim and it is alleged that they had been reappointed by consent in the Bankruptcy proceedings.

The question presented was whether the receivers were entitled to retain certain crops and moneys then in their possession, or whether the farmer debtor was entitled to have those items turned over to him personally.

The court held that in view of the fact that the Bankruptcy Act made no provision for the appointment of receivers under Section 75, that such appointment, even if consented to, was invalid. The court ordered that certain moneys and crops then in the hands of the receivers be delivered to the farmer debtor and ordered

that substantially an equal amount of money be applied on the mortgage indebtedness.

But in the instant case an entirely different situation is presented. The order under review comes as the end result of an accounting to determine the net balance due to the secured creditors. Any crops or other profits arising out of the operation of the farm during the period of the stay properly belong to the farmer debtor, such being the product of his labors and the rentals he has paid.

However, causes of actions existing at the time the farmer debtor is adjudicated a bankrupt belong to the estate of the bankrupt and not to the bankrupt personally.

The right of offset in bankruptcy matters is too well established to require any citation. In the accounting before the referee, the principal question was to determine the amount owed by the Petitioner to the Respondents and vice-versa. If the result established that the Petitioner was indebted to the Respondents in a sum greater than the appraised value, then obviously all that the Respondents can recover is the appraised value. On the contrary, if the result established that the Respondents were entitled to a sum less than the appraised value, nevertheless the Petitioner would be required to pay the appraised value into court and the excess over the amount due to the Respondents would redound to the benefit of other creditors.

It follows, therefore, that the finding of the Conciliation Commissioner that there is due to the Respondents, the sum of Twelve Thousand Five Hundred Twenty-one and 25/100 ($12,521.25) Dollars is correct and should be sustained.

VIII.

The Conciliation Commissioner Had the Power to Appoint a Trustee.

There can be no doubt but that the conciliation commissioner has the power to appoint a trustee under Section 75(s)(3). Section 75(s)(3) provides that,

> "If, however, the debtor at any time fails to comply with the provisions of this section, or is unable to refinance himself within three years, the Court may order the appointment of a trustee, and order the property sold or otherwise disposed of as provided for in this Act."

The authorities are in agreement that a Conciliation Commissioner after a general reference of a proceedings to him, may exercise all the powers of the Court under Section 75, except such as are required to be exercised by the judge.

Remington, Vol. 10, P. 18-19

In re Wiedmer, 82 F. 2nd 566

General Order, L (11)

Adair v. Bank of America, 303 U.S. 350

The Sixth Circuit has held that commissioners are clearly referees and have the same jurisdiction and authority as general referees and in addition the powers conferred on them by Section 75, saying as follows:

> "Federal Land Bank v. Castanien, 116 F. 2d 289, 45 ABR (NS) 176 (1941; CCA 6th) Simons, Circuit Judge:
>
> It would seem to be clear, from consideration of the foregoing sections, that except where otherwise specifically provided, a conciliation commissioner is

clothed by the Act with all the jurisdiction and powers of a referee, and that whatever the court may do, the commissioner may do, unless the power to be exercised is conferred not upon the court as such, but upon the judge. There is nothing novel in this concept. Within the meaning of old sections 23(b) and 60(b), 'Courts' are taken to include the referee, MacDonald v. Plymouth County Trust Co., 286 US 263, 268, 76 L. Ed. 1093, 1905, 52 S. Ct. 505, 20 ABR (NS) 255 (CCA 2). A conciliation commissioner is clearly a referee. While he is a particular kind of a referee, and while to him are referred the supervision and liquidation of the estates of farmer-debtors only, it would seem that within such limits he exercises all of the jurisdiction and authority with which general referees are clothed."

"The case of In re Ashworth, 31 F. Supp. 52, 45 ABR (NS) 441 (1938; DC Ill) is in accord with this view. While in that case emphasis was placed upon a local rule of court, it would seem that the order of reference in the present case is even broader than the rule there applied, and it should also be noted that decision was rendered before the Chandler Act became effective, more particularly defining by Sec. 38 the jurisdiction of the referee."

It follows that the Conciliation Commissioner had ample authority to appoint a trustee.

IX.

The Note and Mortgage Constituting the Basic Subject matter of This Controversy Were Not Usurious.

It is true that the conciliation commissioner failed to rule expressly that the note and mortgage were not usurious. However, his failure to make any finding is in effect a ruling adverse to the farmer debtor.

The mortgage in question is the standard form of mortgage that has been in general use in Wisconsin for more than twenty-five years in the personal knowledge of the writer. It provided that in the event of the failure of the mortgagor to pay the taxes, or to keep the premises insured, the mortgagee might pay such taxes and insurance premiums, in which event, moneys so paid would be added to the principal and thereafter draw interest at ten per cent per annum and become a lien on the premises. It also provided that the past due interest would draw interest after becoming past due at a like rate. The mortgage note bore interest at the rate of five per cent per annum.

That such a mortgage is not usurious is beyond doubt. In *Randall v. Home Loan and Investment Co.*, 244 Wis. 623, 12 N.W. (2d) 915, the court considered a situation involving an installment contract, carrying interest at 9.8%, and providing for interest of one per cent per month on delinquent monthly installments.

The court reviewed several early Wisconsin cases, and, in holding that the contract was not usurious, said in part as follows:

> "In the Restatement, 2 Contracts, P. 2037, Sec. 536, the rule is stated as follows: "Unless especially forbidden by statute a provision in a bargain for a loan that after maturity interest at a higher rate shall be charged than is permissible before maturity, does not render the bargain usurious unless the parties when entering into it contemplate that the loan shall not be paid at maturity."
>
> Under Comment A, it is stated: "A provision within the rule stated in this Section is held to be inserted for the purpose of compelling payment at maturity and not to be bargained for in return for the use of the money, and therefore the provision is not illegal."

In 27 R.C.L. 232, Sec. 33, the rule is stated as follows: "Where a borrower has agreed to pay a rate of interest not forbidden by law, but has stipulated that, in the event of his not making payment at the time specified, the obligation shall bear a higher rate of interest, either from default or from the date of its execution, or that some specific sum shall be paid in addition to the principal and interest contracted for, the increased rate is generally regarded as a penalty, and not within the usuary laws." To same effect see State Mut. Rodded Fire Ins. Co. v. Randall, 232 Mich, 210, 205 N.W. 165, 41 A.L.R. 973; Ramsey v. Morrison, 29 N.J.L. 591, Funk v. Buck, 91 Ill. 575, 577; Diehl v. Becker, 227 N.Y. 319, 324, 125 N.E. 533, 534."

In the instant case, the added interest became effective, only upon default, and constitutes a penalty for default, not interest, and is not usurious.

X.

The Conciliation Commissioner's Finding Upon Questions of Fact Must Be Sustained Unless Those Findings Are Contrary to the Clear Weight of the Evidence.

Substantially all of the conciliation commissioner's findings were upon questions of fact and should be sustained unless those findings are contrary to the clear weight of the evidence.

General Order XLVII provides that:

"Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous * * * "

Even if the findings are incomplete, there is a presumption that the referee acted rightly. Vol. 8, Rem. Bankruptcy P. 32.

In the instant case the Petitioner was given a full and complete hearing before the conciliation commissioner. Great latitude was allowed him in the introduction of evidence. Evidence patently incompetent was permitted to enter the record over Respondents' objection. The conciliation commissioner saw and heard the witnesses and had an opportunity to evaluate their testimony and their interest or bias.

His findings have been affirmed by an able and experienced District Judge.

The duties of a conciliation commissioner and the reviewing judge were summarized in *Kauk v. Anderson,* 137 F. 2d 331, (Eighth Circuit) where Judge Sanborn said:

> "The conciliation commissioner in a case such as this is the trier of the issue of value and is acting as a referee. His findings of fact must be accepted upon review unless clearly erroneous. They are clearly erroneous if they are based upon a substantial error in the proceedings or upon a misapplication of the controlling law, or if they are unsupported by any substantial evidence, or if they are contrary to the clear weight of all the evidence. Dunsdon v. Federal Land Bank of St. Paul, supra. The duty and responsibility of the conciliation commissioner is to impartially and competently try the issue of value upon the lawful evidence adduced by the parties, to fairly appraise the credibility of the witnesses and the weight of their evidence, and, upon the basis of the competent, credible evidence, to soundly determine the issue tried. The function of the district judge, in reviewing the determination of the conciliation commissioner, is to ascertain (1) whether a

fair hearing was accorded, (2) whether all competent evidence offered was received and considered, (3) whether any incompetent evidence was received and relied upon, (4) whether there was substantial competent evidence to support the determination, and (5) whether it is contrary to the clear weight of all of the competent evidence adduced.

The district judge may not try the issue de novo upon the record and substitute his judgment of value for that of the conciliation commissioner. Dunsdon v. Federal Land Bank of St. Paul, supra. If the parties were accorded a fair hearing by the commissioner, if no prejudicial error was committed by him, if all competent evidence was considered, and no incompetent evidence was relied upon, and if he reached a determination justified by the evidence, his determination is, ordinarily, conclusive. This does not mean that, on review, the district judge is required to blindly and literally accept as substantial the testimony of expert witnesses which is opposed to physical facts or to common knowledge or to the dictates of common sense or which is obviously based upon pure speculation. Svenson v. Mutual Life Ins. Co. of New York, 8 Cir., 87 V. 2d 441, 445, and cases cited. It does mean that substantial, competent, and credible evidence, adduced before the commissioner, which supports his determination, may not be disregarded by the district judge upon review."

A cursory reading of the evidence will establish that the conciliation commissioner's findings are clearly supported by the evidence, were affirmed in the District Court, and should be affirmed here.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be affirmed in all respects.

This matter has been in litigation since March, 1933, a period of more than sixteen years. The secured creditors have been put to prolonged expense and litigation in an effort to recoup a portion of their life's savings loaned to the farmer debtor in good faith in 1923.

The farmer debtor has now been accorded the full and complete protection of this legislation. He had three years in which to refinance himself, yet he waited until three (3) days before the end of that period to make a purported and defective attempt at redemption. He has been given a full and complete hearing and every opportunity to assert any and every claim.

It is now time that the rights of the secured creditors be recognized by the sale of the farm in question and the speedy termination of this proceedings.

Respectfully submitted,

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and HELEN FEUERSTEIN,
Respondents.